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IN THE

Supreme Court of the United States

October Term, 1950

No. 419

LINUS PAULING, *Petitioner*,

v.

JAMES O. EASTLAND, THOMAS J. DODD, OLIVER GASCH, and JOSEPH C. DUKE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit, which affirmed an order of the U. S. District Court for the District of Columbia dismissing the petitioner's complaint.

OPINIONS BELOW.

The order of the District Court dismissing the complaint was made on August 23, 1960. It is unreported. The Court of Appeals for the District of Columbia Circuit affirmed the order on September 6, 1960. It is unreported. A copy of

that order is attached hereto as Appendix A. Chief Judge Prettyman made a statement of his views on September 7, 1960; it is set forth as Appendix B.

JURISDICTION.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. 1254(1) [62 Stat. 928].

QUESTION PRESENTED.

Does a complaint, filed in a U. S. District Court, state a cause of action for declaratory and other relief which alleges an order by the Senate Subcommittee on Internal Security[1] made after overruling objection thereto, requiring the petitioner, a witness then appearing before the Committee under compulsory process, to identify the distributors of a petition to the United Nations, urging an international agreement to halt further nuclear weapons tests by all nations, where the complaint recites that the petitioner's ground for refusal to submit such names is fear of reprisals upon those identified, and where the complaint further alleges that reprisals in the form of harassment and loss of employment would in fact result from such identification?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

1. First Amendment to Constitution of the United States;

2. Fourth Amendment to Constitution of the United States;

3. The Federal Declaratory Judgment Act.

These will be set forth in Appendix C, annexed hereto.

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[1] Hereinafter, for purposes of convenience, we shall refer to the Senate Subcommittee on Internal Security as the Committee.

STATEMENT OF THE CASE.

The complaint names as defendants Senators Thomas J. Dodd and James O. Eastland, United States Attorney Oliver Gasch and Joseph C. Duke, Sergeant-at-Arms of the United States Senate.

The complaint sought a declaratory judgment adjudging as void and illegal an order made by the respondent Dodd on June 21, 1960, in behalf of the United States Senate Subcommittee on Internal Security, in the course of the hearing before the Committee, ordering and directing the appellant to reappear before the Committee

> "and bring with him all signatures and purported signatures to the petition presented by the plaintiff to the Secretary General of the United Nations, together with all letters of transmittal by which, or in connection with which, such signatures were transmitted to the plaintiff or received by him." (Complaint, ¶ IV, p. 3)

Incorporated in the Complaint and made part thereof (¶ IV of Complaint) is the official transcript of the hearing before the Subcommittee (in galley proof form). That transcript discloses:

1. That the petitioner answered all questions, fully and responsively, put to him by members of the Committee and its counsel;

2. That he agreed to comply with the first half of the order aforesaid (Committee Transcript of Hearing, p. 30), namely, to appear again before the Committee and bring with him the original signatures of over 11,000 persons who signed the petition to the United Nations;[2]

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[2] The petitioner clarified his willingness to submit that information in a letter addressed to the Court of Appeals, which is part of the certified record transmitted by the Clerk of the Court of Appeals to the Clerk of this Court.

3. That, in context, the second half of the order of the Committee aforesaid, requires identification of the names of the individuals who circulated the petition (see Hearing, p. 23 et seq.); and

4. That the petitioner stated (ibid, p. 27) that he felt his responsibilities to the United States very deeply; and that he wanted to cooperate with the Committee in all respects consistent with his sense of conscience; that he was unable to comply with the request for names, because, as he stated,

> ". . . My conscience does not allow me to protect myself by sacrificing these idealistic and hopeful people, and I am not going to do it. As a matter of conscience, as a matter of principle, as a matter of morality, I have decided that I shall not conform to the request of this subcommittee." (Ibid, p. 25)

He further explained

> "The circulating of petitions is an important part of our democratic process. If it were to be abolished or greatly inhibited, our nation would have made a step toward deterioration—perhaps toward the state of dictatorship, a police state.
>
> ". . . Now, no matter what assurances this subcommittee might give me about the use of the names of the people who circulated the petition that I wrote, I am convinced that these names would be used for reprisals against these believers in the democratic process; these enthusiastic, idealistic, high-minded workers for peace. I am convinced of this because I myself have experienced the period of McCarthyism and to some extent have suffered from it, in ways that I shall not mention. I am convinced of it because I have observed the workings of the Committee on Un-American Activities of the House of Representatives and of this Subcommittee on Internal Security of the Judiciary Committee of the Senate. I feel that if these names were to be given to this Subcommittee the hope for peace in the world would be dealt a severe blow." (Ibid, p. 24)

The complaint alleged (¶ V) that

> "... reprisals, in the form of harassment, and in some instances loss of employment, will be experienced by those who have distributed or circulated said petitions upon plaintiff's submitting to said Committee the names of such persons."

The complaint, accordingly, sought an adjudication of petitioner's rights and duties with respect to said order *duces tecum* pertaining to the names of the distributors of the petition; and a judicial ruling adjudging that portion of the order of the Committee to be illegal and void.[3]

REASONS FOR THE ALLOWANCE OF THE WRIT AND ARGUMENT AMPLIFYING SAME.

The courts below have decided important questions, which should be settled by this Court.

These include:

(1) Whether the First Amendment protects a witness, who has refused to disclose names of circulators of a petition, because of fear of reprisal where those fears are posited on reality.

This issue is similar to that to be adjudicated by this Court in *Shelton* v. *Tucker*, 362 U. S. 958, and *Carr* v. *Young*, 363 U. S. 826, Nos. 14 and 18 respectively, this Term (certiorari granted on April 25, 1960 and June 20, 1960, respectively).

Additionally, the rulings of the courts below on the foregoing issue are in conflict with the decisions of this Court in *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, *Bates* v. *City of Little Rock*, 361 U. S. 516, and *Talley* v. *California*, 362 U. S. 60.

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[3] Relief sought with respect to the United States Attorney and the Sergeant-at-Arms of the Senate will be discussed later.

(2) Whether an order requiring disclosure of names, as indicated above, where there is no showing by, or even claim by, the Committee that a *single* distributor of the petition to the United Nations was a Communist, or in any manner affiliated with Communists or Communism, is an "indiscriminate dragnet procedure, lacking in probable cause" (*Barenblatt* v. *United States*, 360 U. S. 109, 134) so as to violate (in addition to First Amendment rights aforesaid) freedom from unreasonable searches and seizures guaranteed by the Fourth Amendment to the Constitution of the United States.

This Court will adjudicate the validity of an order *duces tecum* by a Congressional committee, involving similar issues, in *McPhaul* v. *United States*, No. 33 this Term (certiorari granted March 21, 1960), 362 U. S. 917.

Here again, the rulings of the court below are in conflict with *Barenblatt* v. *United States*, 360 U. S. 109.

In addition to *McPhaul* v. *United States*, *supra*, this Court has granted certiorari in *Wilkinson* v. *United States*, No. 37, 362 U. S. 926, and *Braden* v. *United States*, No. 54, 362 U. S. 960 (certiorari granted on March 28, 1960 and April 25, 1960; respectively). Both involve the scope of *Barenblatt* v. *United States*, *supra*, and *Watkins* v. *United States*, 354 U. S. 178.[4]

(3) Whether a committee of the Congress exceeds its authority in ordering the disclosure aforesaid, where the petition circulated is directed to the United Nations, and not to the Congress; and whether such inquiry is pertinent to any lawful authority of the Senate Subcommittee on Internal Security.

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[4] Should the court allow certiorari in any of the following petitions, the granting of certiorari herein would seem even more appropriate: *Whitman* v. *United States*, No. 300, this Term; *Price* v. *United States*, No. 331; *Liverright* v. *United States*, No. 328; *Deutsch* v. *United States*, No. 233; *Shelton* v. *United States*, No. 246; *Russell* v. *United States*, No. 239; *Gojak* v. *United States*, Misc. No. 313.

This is a new question not heretofore decided by this Court.

(4) Whether a witness who objects to being required to submit documents, whose legal (and moral) objections are rejected by a Congressional committee, and who is ordered to produce such documents, has standing to secure declaratory relief, and whether it is a justiciable controversy ripe for adjudication; or whether his only recourse is to await a contempt proceeding before the Senate or a criminal prosecution under 2 U. S. Code, Section 192, and defend against either (or both). This is a question never heretofore decided by this Court—a question which needs adjudication by this Court.

ARGUMENT.

I.

THE ORDER DUCES TECUM OFFENDS FREEDOM OF SPEECH, FREEDOM OF THE PRESS, FREEDOM OF ASSEMBLY AND THE RIGHT TO CONSCIENCE, AS GUARANTEED BY THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Here, as in *United States* v. *Rumely*, 344 U. S. 41, 46, the petitioner's petition having been directed to the United Nations, the "radiations of influence" which the petitioner or the circulators of the petition exerted "upon the ultimate legislative process" were so remote as to "raise doubts of constitutionality in view of the prohibition of the First Amendment."

There, as Justice Douglas put it in his concurrence, "The purchase of a book or pamphlet today may result in a subpoena tomorrow" (at p. 57); here, the distributors of the petition (two or three years ago) upon disclosure of their names by the petitioner may receive a subpoena from the Committee tomorrow—and more—they may be subject to harassment and loss of employment.

For the views expressed by the petitioner, and shared by the circulators of the petition, were then "dissident be-

liefs" (*N.A.A.C.P.* v. *Alabama*, *supra*, 357 U. S. 449 at 462); and "identification and fear of reprisal might deter perfectly peaceful discussion of public matters of importance." (*Talley* v. *California*, 362 U. S. 60, 65.) Surely there is no issue in American public life today more important than the prospect of World War III; and no agency of the Government should be permitted by this Court to discourage public discussion of that issue.

That witnesses subpoenaed before Congressional committees suffer reprisal is a matter of common knowledge, and known to this Court; and this is as true of the Committee whose order is being challenged here as it is of the House Committee on Un-American Activities.

Thus, the record in this Court in *Price* v. *United States*, *supra*, this Term, No. 331, discloses that the petitioner there lost his employment with the New York Daily News following his being subpoenaed by this Committee.

The fate of Mary Knowles following her appearance under subpoena before this Committee and after invoking the First Amendment is thus recounted by the Court of Appeals for the District of Columbia Circuit (*Knowles* v. *United States*, No. 13,734, decided June 18, 1960) that she "was discharged from her position as a librarian in Norwood, Massachusetts, but obtained similar employment at a library maintained by a Quaker group in Pennsylvania. That group became subject to considerable pressure in the community to dismiss appellant from her position as librarian." (P. 3, slip opinion.)

Presumably the Committee in the case at bar was looking for Communists (see opening statement of Chairman, p. 3 of Hearing). Accordingly, the mere fact of being subpoenaed by the Committee would mean that such person was a suspected Communist or associate of Communists. This Court recognized that to be subpoenaed before a governmental agency, as a suspected Communist, is to smear

upon such person "a stain of the stamp of disloyalty" (*Sweezy* v. *New Hampshire*, 354 U. S. 234, 238); and the Court; in a context not too dissimilar, noted that "designation" may work "immediate substantial harm" (*Joint Anti-Facist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 159).

II.

THERE WAS NO PROBABLE CAUSE FOR THE ISSUANCE OF THE ORDER DUCES TECUM. ACCORDINGLY, IT VIOLATES RIGHTS GUARANTEED BY THE FOURTH AMENDMENT AND CONSTITUTES AN UNREASONABLE SEARCH AND SEIZURE.

The Committee, in the course of the hearing, at no time made any showing, or even asserted the claim, that any Communist had anything to do with the distribution of the petition.

Assuming the Committee was looking for Communists, in connection with the distribution of the petition, absent any such showing or claim, the effect of the order *duces tecum* is a general "fishing expedition . . . for the chance that something discreditable might turn up—[5] an undertaking which uniformly has met with judicial condemnation." (*Jones* v. *Securities & Exchange Comm.*, 298 U. S. 1, 26.)[6] See also Justice Holmes' comments, for the Court, in *Interstate Commerce Comm.* v. *Brimson* 154 U. S. 447, 479, and *Federal Communications Comm.* v. *American Tobacco Co.*, 264 U. S. 298, 305-6.

All three of the foregoing cases adjudge subpoenae *duces tecum* by administrative agencies to constitute unreasonable searches and seizures.

We think it clear that a compulsory seizure of documents, by any governmental agency, and whether through search warrant or subpoena *duces tecum*, must be posited on probable cause.

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[5] Namely, that a Communist might turn up.

[6] Applied to a Congressional committee in *United States* v. *Kamin*, 135 F. Supp. 382.

Compare Fourth Amendment; and see *Henry* v. *United States*, 361 U. S. 98. See also *Barenblatt* v. *United States*, *supra*.

III.

THE ORDER DUCES TECUM IS NOT PERTINENT TO ANY MATTER WITHIN THE COMMITTEE'S AUTHORITY AND IS BEYOND ITS JURISDICTION.

As heretofore indicated, the petition prepared by the petitioner and circulated by him and others was directed to the United Nations; *not* to the Congress.

The members of the Committee, in seeking to explain the pertinency of the documents to its authority, gave examples of petitions directed to the *Congress* (Transcript of Hearing, p. 29). In any event, it is inconceivable what legislation the Committee might propose, for Congress to adopt, having to do with the circulation of a petition to the United Nations.

IV.

THE PETITIONER HAS STANDING TO SUE; THE COMPLAINT STATES A PRESENT JUSTICIABLE CONTROVERSY, WHICH IS RIPE FOR ADJUDICATION.

(1) The order *duces tecum*, made by the Committee, after rejecting legal objections proffered by the petitioner, is "definite and concrete" within the requirements delineated in *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 240 (quoted with approval in *Joint Anti-Fascist Comm.* v. *McGrath*, *supra*, 341 U. S. at 152, concurring opinion). See also *Public Service Comm.* v. *Wycoff Co.*, 344 U. S. 237, 243.

(2) The fact that there may be another remedy available to the petitioner, as, for example, a defense to a criminal prosecution launched against him under 2 U. S. Code, Section 192 (compare *Barenblatt* v. *United States*, *supra*); or the writ of habeas corpus, in the event he is imprisoned in a contempt proceeding at the bar of the Senate (compare *Jurney* v. *McCracken*, 294 U. S. 125) does not bar him from securing equitable relief.

The Federal Declaratory Judgment Act, 28 U. S. Code, Section 2201, expressly authorizes declaratory relief "whether or not further relief is or could be sought"; and Rule 57, Federal Rules of Civil Procedure, without equivocation, provides:

> "The existence of another *adequate* remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." (Italics ours.)

(3) In any event, defense to a criminal prosecution is not, to the petitioner, an *adequate* remedy at law.

(a) The penalties are severe and dual. The petitioner may be housed in the "common jail" both following a citation by the Senate itself, and a prosecution under 2 U. S. Code Section 192.

See *Jurney* v. *McCracken*, *supra*, 294 U. S. 125.

Under the latter, the imprisonment may be up to twelve months. Many have received such a sentence and have served it. See *Lawson* v. *United States*, (C.A.D.C.) 176 F. 2d 49, 51, 85 A.D.C. 167.[7]

In the three cases, *supra*, in this Court in which certiorari has been granted, *Wilkinson*, *Braden*, and *McPhaul*, the sentences are, respectively, one year, one year, and nine months.

(b) In a criminal prosecution, under 2 U. S. Code Section 192, the petitioner is "bound rightly to construe the statute. His mistaken view of the law is no defense." *Sinclair* v. *United States*, 279 U. S. 263, 299, followed in *Watkins* v. *United States*, 354 U. S. 178, 208.[8]

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[7] This case is known as that of the "Hollywood Ten." Most, if not all, of the ten received and served the maximum sentence.

[8] We shall argue later that declaratory judgment is a peculiarly appropriate judicial remedy to afford the citizen a *correct* view of the law.

And yet the applicable law, as to the rights of a witness before a Congressional committee, is presently uncertain—determined often by a narrowly divided court. Compare *Barenblatt* v. *United States, supra.*

Indeed, "more law will be made" on the subject by this Court during this forthcoming Term of Court in the *McPhaul, Wilkinson* and *Braden* cases, *supra.*

(c) Declaratory judgment is an appropriate *remedy* in the light of the foregoing hazards resulting from criminal sanctions.

In circumstances less onerous and less perilous than those facing the petitioner, the courts of the United States have granted declaratory or other equitable relief.

But recently, in *Evers* v. *Dwyer*, 358 U. S. 202, 203, this Court ruled that the citizen need not run "the risk of arrest" under a State statute requiring racial segregation on buses, in order to challenge the regulation; but that he might secure relief in a United States District Court under the Declaratory Judgment Act.

Similarly, an alien need not undergo the "odium of arrest and detention" (*Brownell* v. *Tom We Shung*, 352 U. S. 180, 183) by being required to resort to habeas corpus to challenge the validity of a deportation or exclusion order; on the contrary, he may secure an adjudication of his rights in a suit for declaratory relief.

See also *McGrath* v. *Kristensen*, 340 U. S. 162; and cf. *Perkins* v. *Elg*, 307 U. S. 325.

Moreover, the order of the Committee being challenged herein may minimally be termed to be a "demand" upon the petitioner. A demand by an Executive Officer of the Secretary of the Interior was held to be the subject of equitable relief in *Santa Fe Pacific R. R. Co.* v. *Lane*, 244 U. S. 492, 498, this Court ruling:

> "The plaintiff was not required, in order to test the validity of the demand, . . . to rely entirely upon de-

> fending such suit as might be brought by the Attorney General. On the contrary, if the demand was unlawful, as we hold it was, the plaintiff was entitled to sue in equity. . . . The hazards and embarrassment incident to any such course were such as to entitle it to act promptly and affirmatively. . . ."

So in *LaCrosse Tel. Corp.* v. *Wisconsin Emp. Rec. Board*, 336 U. S. 18, 22, there was standing to sue, because the action of a State Labor Board certifying a union fixed "a status to which Wisconsin provides a (criminal) sanction. . . ."

Of the two foregoing cases, Justice Frankfurter, in his dissertation on what constitutes "standing to sue," concurring in *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U. S. 123 at 156, says:

> ". . . And if the determination challenged creates a status which enforces a course of conduct through penal sanctions, a litigant need not subject himself to the penalties to challenge the determination. . . ."

We suggest the petitioner is in such a status.

We have heretofore indicated some of the perils facing the petitioner if he may not secure declaratory relief in this proceeding.

The Declaratory Judgment Act is designed especially to avoid these perils. Borchard, *Declaratory Judgments*, Second Edition, under the heading, "Special Purposes and Advantages" (at p. 282) of a declaratory judgment, states that it is available ". . . to make it unnecessary for a plaintiff to act upon his own interpretation of his rights and at his peril . . . thus avoiding the necessity of leaps in the dark."[9]

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[9] Borchard makes the same point more entertainingly when he states (at p. 278) that declaratory judgment is designed to avoid "telling the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool is to eat it."

(A) Analysis of Chief Judge Prettyman's Statement

The court below, on September 6, 1960, entered an order (Appendix A) affirming the order of the District Court dismissing the complaint. The order recited, "Each judge reserves the right to file a statement as to his views."

On September 7, 1960, Chief Judge Prettyman made such a statement (Appendix B). We consider Judge Prettyman's statement below:

(1) Judge Prettyman states (p. 1 of Statement), "at the conclusion of an extensive colloquy Pauling was directed clearly and succinctly by Senator Dodd . . ." to appear at a later date and bring with him the records at issue herein.

Accordingly, the order challenged by the petitioner is "definite and concrete," *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240; and hence ripe for adjudication.[10]

(2) Of course, the United States courts will not exercise their authority *"in vacua"* (p. 2); and will not render "advisory opinions" (p. 2); and we agree that "judicial authority arises upon the happening of an event or the existence of a fact" (p. 2).

Here, the event *has* happened—an order has been made on the petitioner; the fact *does* exist—namely, the order.

Accordingly, the petitioner is not seeking a decision (p. 3) on "an abstract, hypothetical or contingent question" within the ban suggested in *Federation of Labor* v. *McAdory*, 325 U. S. 450, 461.

And Judge Prettyman recognizes (at a later point in his statement, p. 7) that if the courts were to hold the order of the Committee to be void "it is unthinkable . . . the Committee would nevertheless attempt to enforce that directive."

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[10] At another point in his statement (p. 7) Judge Prettyman refers to the Committee's order, at issue herein, as a "specific directive."

Hence the suggestion by Judge Prettyman (p. 7) that the petitioner seeks a "declaratory judgment respecting the validity of *contingent* congressional action . . ." (italics ours) misapprehends the complaint. It is directed to *action* by the Committee, not action *contemplated*, but action *taken* —namely, the order issued on June 21, 1960, presently outstanding, to be complied with by the petitioner on October 11, 1960.[11]

It follows accordingly that the complaint does not ask the courts "to interfere with or impede the processes of the Congress by proscribing anticipatorily its inquiries" (p. 4).

And the decisions cited by Judge Prettyman (f.n. 3, p. 4) in support of the above, are inapposite to the instant case:

In *Mins* v. *McCarthy* (C.A.D.C.), 209 F. 2d 307, the case reached the courts at a time when the questions to be propounded to the witness were *undefined;* here there is a *definite* order. (Here, the petitioner answered all questions.)

And in *Fishler* v. *McCarthy*, 117 F. Supp. 643, 218 F. 2d 164, the ruling of the District Court was affirmed by the Court of Appeals, *per curiam*, expressly on the narrow ground that the District Court lacked venue.

Nor can we agree with the suggestion by Judge Prettyman (adopting the argument of the respondents below) that the granting of relief to the petitioner violates the doctrine of separation of powers (p. 14).

(a) That doctrine manifestly applies to the Executive, as well as to the legislative branches of our government.

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[11] On September 8, 1960, an application to stay the enforcement of and or the return date of the order of the Committee then set for September 15, 1960, until October 10, 1960 (to afford this Court an opportunity to pass upon this petition) was filed in this Court. Thereupon the respondent Dodd, in behalf of the Committee, continued the hearing to October 11, 1960.

In appropriate cases the United States courts have "interfered with" the Executive—in the sense of determining the legality of acts taken or threatened, by officials of the Executive. We list some examples below.[12]

(b) The authority of the courts to review action by a congressional committee, upon an imprisonment for contempt before the bar of either House, or following a criminal prosecution under 2 U.S.C. Section 192, is admitted.

Compare *Jurney* v. *McCracken*, *supra*, *Barenblatt* v. *United States*, *supra*. Such review is not deemed, *per se*, to be a judicial "interference" with the Congress.

Accordingly, the only question is not whether the petitioner may have a judicial review of the order challenged herein, but *when*.

We suggest *now* is an appropriate time; the transcript of the hearing accorded the petitioner by the Committee was before the courts below, and is in this Court. The validity of the Committee's order upon the petitioner may be as readily and appropriately determined now, as to relegate the petitioner to await adjudication in a proceeding carrying severe penal sanctions.

Indeed, the Department of Justice, in behalf of the United States, has heretofore taken a broader position (on the issue of separation of powers) than does the petitioner here.

In *United States* v. *Owlett*, 15 F. Supp. 736 (M.D. Pa. 1936), the United States sought an injunction against an

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[12] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (injunction against the Secretary of Commerce from carrying out an order of the President); *Philadelphia Co.* v. *Stimson*, 223 U. S. 605 (injunction against the Secretary of War); *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123 (declaratory and injunctive relief against the Attorney General); *Dayton* v. *Dulles*, 357 U. S. 144 (declaratory relief against the Secretary of State); *Peters* v. *Hobby*, 349 U. S. 331 (declaratory relief against the Secretary of Health, Education and Welfare; injunction against the Civil Service Commission); *Perkins* v. *Elg*, 307 U. S. 325 (declaratory relief against the Secretary of Labor). This list is, by no means, intended to be exhaustive.

investigating committee of the Pennsylvania legislature to prevent it "from conducting an investigation into the organization, administration and functioning of the Works Progress Administration in Pennsylvania."

Thus this was an attempt far more directly than the petitioner's, to "interfere" with the very functioning of a legislative committee in its attempt to *get* information. The Court granted the injunction, saying, during the course of its opinion (p. 742):

> "The investigating power of a legislative body is limited to obtain information on matters falling within its proper field of legislative action . . ."

Accordingly, since Pennsylvania could not pass any legislation as to the W.P.A., since this would be State interference with a proper governmental function of the United States, its legislative committee had no authority in the matter and could be, and was, enjoined.

The Court rejected the argument that it should not or could not interfere with a legislative committee and that the proper way for the Court to handle the matter was not to enjoin the committee, but that the persons called before the committee could refuse to respond or to answer questions and the matter could be tested in proceedings arising therefrom. The Court said (p. 743):

> "The suggestion that federal employees could refuse to obey the subpoenas, or seek relief by *habeas corpus* from imprisonment for disobedience is no relief. . . ."

State cases are in accord: *Greenfield* v. *Russell*, 292 Ill. 392; *Luscomb* v. *Bowker*, 334 Mass. 468.

And in *Attorney General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co.*, Engl. L. R. 1914 A. C. 237, the Privy Council ruled that a witness may secure a declaratory judgment and injunction against a Royal Com-

mission, exceeding its authority, in requiring the production of documents.

3. Finally, we agree, of course, with Judge Prettyman that, in the case at bar, "no detention has occurred" (p. 3); and that petitioner has not yet been prosecuted for contempt; but the very purpose of the complaint herein is to secure a judicial determination as to the validity of the order challenged wthout the petitioner risking, as heretofore indicated, the "odium of arrest and detention," *Brownell* v. *Tom We Shum*, 352 U. S. 180, 183, or running "the risk of arrest," *Evers* v. *Dwyer*, 358 U. S. 202, 203.

V.

THE PETITIONER HAS STANDING TO SUE THE RESPONDENT JOSEPH C. DUKE AS SERGEANT-AT-ARMS OF THE SENATE

The respondent Duke, under express direction of the respondent James O. Eastland, as Chairman of the Committee so to do, served upon the petitioner the subpoena issued by said Eastland to appear before the Committee on June 20, 1960; the order of suboena *duces tecum* contested herein, is an order supplemental to, and ancillary to, the subpoena aforesaid; for it was by virtue of the subpoena and the service thereof by said respondent Joseph C. Duke that the Committee secured jurisdiction over the petitioner to make the ancillary order *duces tecum* which is the issue herein.

It is clear that an officer of the Congress who serves or enforces an order of the Congress, where that order is invalid, is liable in damages for resulting injuries.

Kilbourn v. *Thompson*, 103 U. S. 168.

It follows from *Kilbourn* that had the petitioner suffered substantial damages as a result of the service upon him of the subpoena, if it were invalid, he could recover such damages from said respondent Duke; where the consequences to said petitioner are less serious than they were in *Kilbourn*, the petitioner has as much standing to sue as did Kilbourn.

VI.

THE PETITIONER HAS STANDING TO SUE THE RESPONDENT OLIVER GASCH AS UNITED STATES ATTORNEY.

Upon the matter being certified to him, the respondent Oliver Gasch, as United States Attorney, is under requirement to present it to the Grand Jury (2 U.S.C. Sec. 194).

That equitable relief is available in exceptional circumstances to enjoin a criminal prosecution is settled; a United States Attorney was so enjoined in *Shields* v. *Utah, Idaho Central R. R. Co.*, 305 U. S. 177, 183. There this Court stated:

> "... Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted, even though the complainant seeks to enjoin the bringing of criminal actions." (Citing *Philadelphia Co.* v *Stimson*, 223 U. S. 605, 621, 622; *Truax* v. *Raich*, 239 U. S. 33, 37, 38; *Terrace* v. *Thompson*, 263 U. S. 197, 214.)

With respect to the respondents Joseph C. Duke [13] and Oliver Gasch, the petitioner seeks relief against them, only in the event that the Court should determine that it has no jurisdiction to grant the relief prayed for against the respondent Thomas J. Dodd with respect to the order *duces tecum* issued by said respondent.

In that event, we urge the Court to adjust the remedy to meet the petitioner's need, for it has been decided that "Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood*, 372 U. S. 678, 684.

Respectfully submitted,

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September 16, 1960

[13] We have joined Senator Eastland as a defendant solely because the jurisdiction of the Court over the defendant Duke would stem from the subpoena issued by Senator Eastland and served by said defendant.